Mr. Corbin Davis
Clerk of the Michigan Supreme Court
Michigan Hall of Justice
P.O. Box 30052
Lansing, Michigan 48909

RE: ADM File No. 2002-34
Proposed Amendment of Rules 7.204, 7.210, 7.211, 7.212, and 7.216 of the Michigan Court Rules

Dear Mr. Davis,

I have waited to comment on the proposed changes until my work with and the report of the State Bar Intake Delay Reduction committee was completed and sent to Chief Judge Whitbeck and to this court. To avoid reiterating points already made by others, SADO supports the positions and comments of the Appellate Practice Section, the State Bar Taskforce on Appellate Delay, the Michigan Appellate Assigned Counsel Systems statement and the State Bar Intake Delay Reduction Committee.

I am writing in opposition to the proposal to reduce the time for filing the Appellant's brief in criminal appeals to 42 days. The proposed reduction would be accomplished by eliminating the 28 day stipulation period for both the Appellant and the Appellee; by eliminating an additional 28 days of briefing time and by allowing only a 14 day extension available to the parties.

SADO opposes the amendments for two basic reasons. First, even with unlimited resources, the current structure of Michigan's criminal appeals prevents this shortening of the time. The criminal appellate process differs substantially from our civil counterpart - one size cannot fit all. Second, just as the Court of Appeals could not eliminate its "warehouse delay" without additional resources, so to, the institutional criminal appellate bar, SADO and all prosecutors cannot "go any faster" without added attorneys.

Criminal Appeals Are Structurally Different Than Civil Appeals

Unlike Civil appeals, criminal appeals require that the entire record and transcript must be ordered and reviewed. Anders v California, 386 US 738 (1967) requires that the Court independently review the entire record whenever an attorney files an Anders brief. Therefore both counsel and the court require preparation of the entire record in all criminal appeals. Many civil appeals only require reviewing a portion of the record germane to the issues raised.

Roughly 90% of criminal appeals are assigned and counsel, different then trial counsel, is appointed on the appeal. Michigan has one of the least organized and trained appointed trial bars in the country. Each county is different and the cooperation of trial counsel and the completeness of trial files varies extremely almost lawyer by lawyer. Moreover, MCR 7.203(B), unlike any other state's direct appeal procedure, combines the direct and post

conviction appeal. While more demanding initially, ultimately this procedure reduces years off the total time that the majority of appeals takes and is far more efficient for defendants, victims, witnesses and prosecutors whenever re-prosecutions are required. This procedure however necessitates that any and all issues must be raised in the first, direct appeal. In turn, this requires that counsel must talk to the defendant in person to explore off record potential issues and to establish a relationship with the client. This relationship is imperative not only to discover potential issues, but the trust is essential to discuss the potential risk for a longer sentence many defendants may face if their appeal is successful. Since many defendants voluntarily dismiss their appeal, this stage of the process is extremely important. However, it takes time.

Phones are limited to 5-10 minute calls. The majority of clients have extremely limited writing ability. Therefore, counsel on appeal must order and read the entire record; visit the client in person; investigate any and all potential off record issues; research and write any and all possible meritorious issues on appeal; appear for orals argument whenever and if allowed and handle any hearings in the trial court required by the post-conviction work or remands from the Court of Appeals. These burdens sharply differentiate the appellate work in this state from our civil counterparts and indeed separate it from any other state in the time needed to process the case.

The ABA standards on Appellate Court Disposition Time state – that there is no perfect timing for appeals. To develop a system to improve the process, they recommend that each state convene all the players to discuss the unique needs of their state's system and recommend a joint approach. That was not done here. The Court of Appeals internally worked on a proposal and then announced it. All the players are reacting to the proposal on the table. In turn this engenders best case bargaining, rather than developing a system appropriate to the needs of all the components that can best take into account the unique needs of Michigan and of all the components within the system. While the proposal of the Court might meet its needs, it will increase its costs in the pre-hearing stage, but add to the costs of the citizens paying for retained appeals and to the tax payers who pay for defense and prosecutors on appeal. Moreover, in many of the larger civil firms, they may not be able to handle sufficient cases per attorney to justify having specialized appellate divisions. Likewise, given the low fess paid to appointed counsel, they may not be able to handle sufficient cases to remain appellate specialists. The net effect may be to save days on an appeal but lose the specialized appellate bar.

Appellate Timing Is Not Controlled By the Lawyers

Appeals differ markedly from trial practice in setting calendars. Unlike motion or trial dates in trial level cases, appellate attorneys never schedule when hearings or briefs are due. Once appointed or retained, the clock does not start until the transcript is filed. Three cases retained or appointed months apart could have their records filed in the same week. Remands can be granted when the court so decides, starting another clock. Orals are set by the court, opinions are issued that require further decisions and action on their own clock, and applications are granted when the court decides. For full time, professional appellate attorneys, these events are occurring regularly in their caseload. If the time is

severely shortened and there is virtually no possibility for extensions, work cannot be moved. The only way to allow for the time need to do a quality job will be to have fewer cases so the time will be there if needed. No private firm or public entity can afford to have attorneys sitting idle waiting for possible work. Moreover, in criminal appeals, a different lawyer stepping in is extremely inefficient and often requires the new lawyer to redo what another lawyer has already done – adding costs and time.

Eliminating Stipulations Will Add Work to both the court and the parties

The data shows that stipulations are frequently used but not in every case. If stipulations were eliminated, then motions would replace them. The cost for motions far exceeds the cost for stipulations both in time, paper, and costs. They will add measurably to the court's processing time giving individual consideration to each motion – time they do now not give. Or, the motions will not be considered individually but will be routinely granted or denied based not on the needs of the party but the type of case – thus defeating the obvious needs discussed above to move work around to handle new timing dates occurring regularly to high volume practitioners. In either scenario, this is added time, costs and potential rigidity that has not been demonstrated by the data.

There is no question that one size for all is easier for the Court of Appeals to administer, but it hardly fits the realities of Michigan practice. No mention is made anywhere of the differences between civil or criminal appeals. No mention is made that the ABA recommended time for disposition is for ***all*** appeals – ***not full opinion*** appeals only. No mention is made that many of the criminal outlier cases that add to the average time to disposition involve either grossly delayed transcripts or involve cases remanded to the trial court. At SADO, 12.5% of all our full opinion cases have either a timely motion for new trial filed during intake or a motion for remand granted. This alone adds months to the disposition time computed by the court of appeals

Under the present system, extra time is often needed to conduct investigations and prepare all issues for the appeal of right. If the issue is not raised and could have been raised this may preclude the ability of the defendant to raise it at all at a later date. If the time is severely shortened, Michigan will be forced to revert to the system used in other states. This will require revisiting an entire body of court rules that relate to direct appeals and to MCR 6.500 rules, none of which have been studied or proposed. Again, this would have been discussed if all the players h ad been convened to discuss the entire body of related issues raised by accelerating the timing. The system that would be in place as a result of this severe time reduction, inflexible extension policy and preclusion of raising the issue in 6.500 proceedings will create a process where issues on direct appeal and issues normally heard in post conviction motions will not be able to receive a "full and fair hearing in the state courts". This undoubtedly will raise concerns regarding the ability of counsel to be effective in the appeal of right and also Federal due process concerns on the ability of criminal appellant's to exhaust their rights in matters traditionally resolved in "post conviction" proceedings.

Moreover, to restrict counsel to 42 days to do all the research writing and investigation mandated by the appellate practitioners would result in the absurdity that court reporters who add nothing to the issues and thought before the court would more than double the time to produce the transcript than the litigant would have to present their best research and arguments to advance the interests of their clients and to potentially develop the common law. Why?

Has their ever been an issue where the bar has so universally opposed a proposed rule?

In conclusion, SADO asks that the current proposal be tabled until the committee studying record delay issues its report and then asks that the Court appoint a broad based committee to study all the information and make recommendations for further action, if necessary.

Sincerely Yours,

James R. Neuhard
Director, State Appellate Defender Office

C: Appellate Defender Commission

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